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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT

CHRISTOPHER LEE DUNN,

Plaintiff,

-vs-

CITY OF BURBANK; DENNIS A. BARLOW; AND DOES 1 THROUGH 25, INCLUSIVE.

Defendants.

CASE NO.: BC 418 792

OPPOSITION TO DEFENDANT'S SPECIAL MOTION TO STRIKE COMPLAINT

Date: October 6, 2009
Time: 8:30 a.m.
Dept.: 40

Complaint Filed: July 28, 2009

Assigned to: Department 40

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

Plaintiff CHRISTOPHER LEE DUNN respectfully submits the following Memorandum of Points and Authorities in Opposition to CITY OF BURBANK and DENNIS A. BARLOW's Special Motion to Strike the Complaint pursuant to *Code of Civil Procedure* § 425.16.

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I. INTRODUCTION

The instant motion pits the Defendant's right to disseminate private information to the media against Mr. Dunn's constitutional rights of privacy.

Plaintiff concedes that the Complaint was inartfully pleaded. It should properly contain no reference to *Penal Code* § 832.7, as Plaintiff agrees that no private right of action exists under that particular statute.[1] Nevertheless, the first cause of action in the complaint is for violation of article 1, section 1, of the California Constitution - not *Penal Code* § 832.7. The Privacy Initiative in article I, section 1, creates a right of action for invasion of privacy against private as well as government entities. Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 20. It is equally well settled that employees have a right of privacy in their employment records. People v. Mooc (2001) 26 Cal.4th 1216, 1220. For reasons discussed at length below, then, Plaintiff maintains that sufficient evidence exists to support a cause of action under the California Constitution such that the within motion should properly be denied.

The defamation cause of action is similarly actionable. As described below, Defendant Barlow made false, unprivileged statements to the press which charged Plaintiff Dunn with the commission of a crime, among other untrue things. No immunity exists and, therefore, the case should properly proceed on the merits, not be determined by dispositive motion at this early stage in the proceedings.

Lastly, Plaintiff concedes that the cause of action for injunctive relief may more properly have been pleaded as a remedy instead of a separate cause of action. This practice, however, is common in California and should not provide the basis for an anti-SLAPP motion under any circumstances.

Therefore, and for reasons more fully explained in detail below, Plaintiff respectfully maintains that sufficient evidence exists to support each and every cause of action in the complaint such that Defendant's special motion to strike should properly be denied.

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[1] Plaintiff respectfully requests that he be allowed to correct this error and file an amended pleading omitting *Penal Code* § 832.7.

II. THE INSTANT LAWSUIT IS NOT BARRED BY CALIFORNIA'S ANTI-SLAPP STATUTE

Code of Civil Procedure § 425.16 (hereinafter the "anti-SLAPP statute") provides that "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech... in connection with a public issue shall be subject to a special motion to strike, unless the court determines that there is a probability that the plaintiff will prevail on the claim." Navellier v. Sletten (2002) 29 Ca. 4th 82, 87-88.

The statute thus establishes a two-part test for analyzing anti-SLAPP motions. In the first part of the test, the moving party must "make a threshold showing the challenged cause of action arises from an act in furtherance of the right of petition or free speech." A.F. Brown Electrical Contractor, Inc. V. Rhino Electric Supply (2006) 137 Ca. App. 4th 1118 at 1124.

For the second "prong" of the analysis, the burden of proof shifts to the non-moving party to show a mere probability of prevailing on the claim. *Id.* To further clarify, "the court considers whether the plaintiff has made a prima facie showing of facts based on competent admissible evidence that would, if proved, support a judgment in the plaintiff's favor." Mann v. Quality Old Time Service, Inc. (2004) 120 Cal.App 4th 90, 105. **A claim must "lack even minimal merit" to fail this part of the test.** Navallier, *supra* at 89 (Emphasis added). The plaintiff "is not required 'to *prove* the specified claim to the trial court;' rather, so not as to deprive the plaintiff of a jury trial, **the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim.**" Mann, *supra* at 105. (Emphasis added.)

As more fully discussed below, the moving party has failed to make a threshold showing as required under the holding of A.F. Brown Electrical Contractor, Inc., *supra*. Moreover, even assuming that the Defendant has met this burden, there is sufficient evidence of Plaintiff's invasion of privacy and defamation claims to "substantiate a legally sufficient claim" as set forth in Mann, *supra*. Therefore, and for reasons more fully set forth below, Plaintiff respectfully requests that this Court deny the relief requested in the moving papers.

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A. **The Challenged Causes of Action Do Not Arise Out of an Act in Furtherance of the Right of Petition or Free Speech**

Speech is subject to the anti-SLAPP statute if it falls into any of the following categories: "(1) any written or oral statement or writing made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or and issue of public interest." *Code of Civil Procedure* § 425.16(e).

The "speech" which Defendant claims is protected – a 21-page termination letter and "Brady" letter that the Defendant leaked to the media – clearly does not fall under the first category. Termination reports and news reports are not "legislative, executive or judicial proceeding[s]" by any stretch of the imagination.

With respect to the second category, the "speech" which Defendant claims is subject to the anti-SLAPP statute was not made "in connection with" a lawsuit. The 21-page termination letter was completed on July 17, 2008, long before any lawsuit was filed in this matter. While Plaintiff concedes that communications preparatory to or in anticipation of the bringing of an action or other official proceeding are entitled to the protection of the anti-SLAPP statute (see Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996) 47 Cal. App. 4th 777, 784), the 21-page termination letter was **not** written in anticipation of litigation, nor have Defendants made any such claim. Thus, the "speech" at issue is not protected under Section 425.16(e)(2).

The third category protects "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." Leaking the "Brady" letter and 21-page termination notice to the press, without referencing the press release or any other explanation or source information, is simply not a "written or oral statement or writing made in a place open to the public or a public forum." Nor can such a subterfuge, lacking source information,

reference to the press release, or any context or explanation for the leak, constitute a "written or oral statement or writing . . . in connection with an issue of public interest." As such, the anti-SLAPP statute has not been invoked under the third "prong" of the analysis.

Lastly, the fourth "catch-all" category, requires the "speech" to be in "furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or and issue of public interest." For reasons explained immediately above, the disclosure of the documents was not made "in connection with an issue of public interest." Moreover, the act of providing the documents to the media cannot be conduct in the furtherance of free speech rights or petition because there is no right of free speech as to the dissemination of private documents. See Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal.4th 360.

Therefore, Defendant has not made the threshold showing that the challenged causes of action arise in the furtherance of free speech under the anti-SLAPP statute. For this reason, alone, Defendant's motion should properly be denied.

B. Plaintiff's Evidence Substantiates His Legally Sufficient Claims

If the Court finds that the Defendant has made the threshold showing the challenged cause of action arises from an act in furtherance of free speech *(which Plaintiff does not, by any means, concede)*, the burden shifts to the Plaintiff to show that "there is a probability that the plaintiff will prevail on the claim." *Code of Civil Procedure* § 425.16(b)(1). "At this second step of the anti-SLAPP inquiry, the required probability that [the plaintiff] will prevail need not be high. The California Supreme Court has sometimes suggested that **suits subject to being stricken at step two are those that "lack even minimal merit."** Navellier, *supra* at 708. (Emphasis added).

"[T]he Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities" (Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 20), and "protects the individual's reasonable expectation of privacy against a serious invasion." Puerto v. Superior Court (2008) 158 Cal.App.4th 1242, 1250. It is also well settled that a California employee maintains a right of privacy in his or her employment records. *Id.* at 1250. (See also Garstang v. Superior Court (1995) 39 Cal.App.4th 526, 533.)

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In Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal.4th 360, the California Supreme Court announced an analytical framework for evaluating claims of invasion of privacy under the California Constitution. Initially, the claimant must possess a "legally protected privacy interest." Second, the claimant must have a reasonable expectation of privacy under the particular circumstances. Finally, the invasion of privacy must be serious in nature, scope, and actual or potential impact. (Pioneer, *supra*, 40 Cal.4th at pp. 370-371.)

1. Officer Dunn has a Legally Protected Privacy Interest in His Employment Records

It is well settled that peace officers have a privacy interest in their employment records. (See, People v. Mooc (2001) 26 Cal.4th 1216, 1220 (statutory scheme recognizes a peace officer's "legitimate expectation of privacy in his or her personnel records"); BRV, Inc. v. Superior Court (2006) 143 Cal.App.4th 742, 756 ("[p]ublic employees have a legally protected interest in their personnel files"); San Diego Trolley, Inc. v. Superior Court (2001) 87 Cal.App.4th 1083, 1097 ("personnel records ... are within the scope of the protection provided by the state and federal Constitutions"); Garstang v. Superior Court , *supra* at 533 ("where the communications were tendered under a guaranty of confidentiality, they are thus manifestly within the Constitution's protected area of privacy."). The United States Supreme Court has also held that the constitutional right to privacy protects individuals from government disclosure of personal information. Whalen v. Roe (1977) 429 U.S. 589, 599-600.

Under a long line of cases, then, employees such as Plaintiff Dunn have a legally protected privacy interest in their personnel records. Therefore, the first part of the Pioneer Electronics analysis has been satisfied.

2. Officer Dunn's Expectations of Privacy with Respect to His Personnel File is Reasonable Under the Circumstances

Our Supreme Court has recently explained that "in order to establish a reasonable expectation of privacy, the plaintiff 'must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant.' (Citations.)" Sheehan v. San Francisco

49ers, Ltd. (2009) 45 Cal. 4th 992, 1000. Here, there is no inference that Plaintiff Dunn consented to any disclosure of his personnel file or the records contained therein. Dunn has thus satisfied the "consent" element of the analysis.

"A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." Hill, *supra* at p. 37. The "community norms" in this case, as set forth in the above line of cases beginning with People v. Mooc, support a conclusion that a right of privacy exists in an employee's employment records and personnel file. This is undisputed in the moving papers, and weighs substantially in favor of Plaintiff Dunn.

Furthermore, "generalized differences between public and private action may affect privacy rights differently in different contexts. ... **"[I]f a public or private entity controls access to a vitally necessary item, it may have a correspondingly greater impact on the privacy rights of those with whom it deals.**" Hill, supra at p. 39. (Emphasis added.) In the present case, then, because the Defendant (a governmental entity) was the custodian of both the 21-page termination letter and the Brady letter, the disclosure of same has a "correspondingly greater impact" on Dunn's privacy rights.

Lastly, in issues concerning the "invasive conduct of government agencies rather than private, voluntary organizations," the government has the "burden of establishing that there were no less intrusive means of accomplishing its legitimate objectives." Sheehan, *supra* at p. 1002. Here, there were certainly less intrusive means to combat Plaintiff's press release than disclosing the 21-page termination letter and the Brady letter. A simply denial would have sufficed. And, more importantly, Defendant City of Burbank has the burden of establishing that it could use no "less intrusive means," which it has failed entirely to do in the moving papers.

Therefore, the second "prong" of the Pioneer Electronics analysis has been satisfied.

3. Defendants' Privacy Invasion is Serious in Nature, Scope, and Actual or Potential Impact

The governmental disclosure of an employee's personnel records is serious in nature, scope, and actual or potential impact, as set forth in the above line of cases beginning with People v. Mooc. Moreover, the 21-page termination letter details an investigation where accusations were made that

Plaintiff "tipped off" an informant and thereby compromised an investigation. Clearly the unwarranted disclosure of this information is serious in nature, scope, and actual or potential impact.

Defendant, however, argues that it was entitled to release Plaintiff's 21-page Termination Letter and other material under an exception provided by *Penal Code* §832.7(d). Section 832.7(d) allows the release of certain information from an officer's file to correct certain **false statements** made by the officer or his representative. However, Subsection (d) is very precise and limited in application. It states:

> "(d) Notwithstanding subdivision (a), a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement **he or she knows to be false** concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. **Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.**" *Penal Code* §832.7(d). (Emphasis added.)

Section 832.7(d) does not apply in the case at bar for several reasons. First, neither Plaintiff nor his agents "publicly [made] a statement he or she [knew] to be false concerning the investigation or the imposition of disciplinary action." (See Dunn Declaration ¶ 3) The only statement released to the press prior to Defendants' release of Plaintiff's 21-page Termination Letter and other materials, was a press release ("Press Release") (a copy of which is attached as Exhibit "A" to Gresen Declaration).

And it can not really be disputed that Plaintiff Dunn believed that his statements were true. Objectively, documentary evidence supports this conclusion. First, The Primary witness against Dunn submitted an 8 page letter immediately following her release from custody stating that she was coerced into falsely testifying against Dunn in exchange for her release, among other things. A true and correct copy of this letter is filed conditionally under seal herewith, marked as Exhibit "E," and is incorporated herein by this reference. Furthermore, a Burbank PD Sergeant submitted a complaint that his supervisors were attempting to coerce and intimidate him into lying to investigators about facts and circumstances pertaining to Dunn. A true and correct copy of this memorandum is also

filed conditionally under seal herewith, marked as Exhibit "F," and is incorporated herein by this reference.

This evidence not only substantiated Dunn's claims of bias and improper behavior, but is arguably evidence of the commission of various crimes by several Burbank police officers. At the very least, this evidence is sufficient to support the conclusion that Dunn honestly believed that the facts set forth in the press release were true.

Further, Defendants have not identified in the moving papers even one single fact in the press release concerning an investigation or disciplinary action that they contend Plaintiff Dunn knew to be false. Absent such facts, Plaintiff and the Court are left to guess which statement(s) were found to be objectionable by Defendant. This is a fatal flaw in the moving papers, and may not be cured in the reply.

Even if one assumes, *arguendo*, that the Press Release did contain a false statement concerning an investigation or disciplinary hearing, Defendants would not have been allowed under Section 832.7(d) to release Plaintiff's full 21-page Termination Letter. Under Section 832.7(d), the release allowed is **"limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public."** (Emphasis added.)

Defendants exceeded the bounds of Section 832.7(d) when they released the full 21-page Termination Letter because that letter contained much more than "facts . . . concerning [any] disciplinary investigation or . . . disciplinary action" that would refute the undisclosed and unknown statements in the Press Release which Defendant did not describe in the moving papers.

Defendants responded to a one-page statement with a 21- page dissertation which, at the end, admits that Dunn's reputation as a result of the investigation has been irreparably harmed. Defendants then placed this information into the hands of the media, knowing full well the effect it would have on the Plaintiff.

Furthermore, the 21-page Termination Letter does not contain "facts." Rather, it contains conclusions and justifications for firing Plaintiff, along with a summation of alleged grounds for the termination. It is, by definition, a one-sided document designed only to protect Defendants and

justify their actions. Plaintiff respectfully maintains that such one-sided conclusions should not properly be deemed by this Court to be "facts" as the term is used in Section 832.7(d).

Therefore, the third and final "prong" of the analysis described in Pioneer Electronics has been satisfied, such that the motion should properly be denied.

4. Plaintiff's Evidence Substantiates His Claim

As more fully described above, the Privacy Initiative in article I, section 1 of the California Constitution creates a right of action for invasion of privacy against private as well as government entities. Hill, *supra* at 20. (See also Puerto, *supra* at 1250, and Pioneer Electronics, *supra* at 370-371.) It is equally well settled that employees have a right of privacy in their employment records. People v. Mooe, *supra* at 1220.

It is undisputed that Defendant disclosed Plaintiff Dunn's private employment records to at least one member of the press (Declaration of Carol Humiston, ¶3-6), thereby violating Plaintiff's reasonable expectation of privacy.

Therefore, and for reasons more fully described above, Plaintiff respectfully maintains that there exists the requisite probability that Plaintiff will prevail on his claim as required under *Code of Civil Procedure* § 425.16(b)(1), as set forth above. Based thereon, Plaintiff respectfully maintains that the within anti-SLAPP motion should properly be denied.

D. The Instant Lawsuit Is Not Barred by California's Anti-SLAPP Statute

As set forth above, at length, *Code of Civil Procedure* § 425.16 creates a two-part test for analyzing anti-SLAPP motions. Defendants, however, and as more fully described above, have failed in the moving papers to establish the necessary elements to support either "prong" of the two-part test. Therefore, Plaintiff respectfully requests that this Court deny the anti-SLAPP motion filed by Defendant and allow this case to properly proceed on the merits.

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III. THE EVIDENCE SUPPORTS A CAUSE OF ACTION FOR SLANDER

"Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: (1) Charges any person with crime, or with having been indicted, convicted, or punished for crime; (2) Imputes in him the present existence of an infectious, contagious, or loathsome disease; (3) Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; (4) Imputes to him impotence or a want of chastity; **or** (5) Which, by natural consequence, causes actual damage." *Civil Code* § 46. (Emphasis added.)

A. The Publication Was False

On July 17, 2009, the Burbank Leader published the following statement made by Defendant Barlow, "This lawsuit is an abuse of the judicial system by a former officer who was terminated a year ago for egregious misconduct which led the District Attorney to declare that he had obstructed justice and compromised a criminal narcotics investigation." (Humiston Decl., Exhibit "3.") The implication is clear. Because Dunn was allegedly terminated for "egregious misconduct," the District Attorney was beside himself and "declared" that Plaintiff had obstructed justice, etc.

The true facts, however, were that Dunn's "termination" did not "lead the District Attorney" to declare anything. How could it? The Brady Letter was issued on May 9, 2008, well **before** Dunn was terminated in July, 2008.

The Brady Letter actually states that when the Plaintiff is a material witness on a case, the DA must turn over to defense counsel information which establishes that Dunn "telephoned a Burbank Police Department informant, and advised her that the Culver City Police Department was conducting a criminal investigation into her involvement with narcotics sales." The Brady Letter goes on to say that "the Brady Alert System should not be used as a basis for a personnel action against (Dunn)." Which is a far cry from what Barlow said to the press.

Therefore, Plaintiff respectfully submits that the publication was false, thereby satisfying the first element of the Slander analysis.

B. The Publication Was Unprivileged

In the moving papers, Defendants argue that the publication is protected under the "fair comment or opinion privilege." The "fair comment or opinion privilege," however, provides only that "statements of **opinion** concerning public officials are recognized as privileged against claims of

libel." Young v. County of Marin (1987) 195 Cal. App. 3d 863, 872. (Emphasis added.) This is problematic for the moving party for two reasons.

First, Plaintiff Dunn is not a public official. While Plaintiff concedes that police officers have routinely been held to be "public officials" for the purposes of defamation actions (See, e.g. Gomes v. Fried (1982) 136 Cal. App. 3d 924, 933), it is undisputed that Plaintiff Dunn is not a police officer, and has not been a police officer since July, 2008. At the time the press release was issued in July, 2009, Plaintiff was simply a private citizen who expressed his discontent with his employer for what he honestly believed to be a discriminatory termination. For this reason, alone, the publication was unprivileged.

And even assuming that this Court concludes that Plaintiff was a public official *(which Plaintiff does not concede)*, no privilege exists so long as "actual malice" (knowledge of falsity or reckless disregard for the truth) is shown. See New York Times Co. v. Sullivan (1964) 376 U.S. 254.

Clearly, Barlow either knew, or in the exercise of reasonable diligence should have known, that the Brady Letter predated Plaintiff's termination, and therefore could not have "led the District Attorney to declare that (Dunn) had obstructed justice and compromised an ... investigation." Barlow also knew, or in the exercise of reasonable diligence should have known, that the Brady Letter should "not be used as a basis for a personnel action," and he should not have implied that the DA personally investigated and reached **any** conclusion about Dunn's alleged conduct. Therefore, sufficient evidence exists of "actual malice" to survive the within anti-SLAPP motion - even if the Court concludes that Plaintiff is a "public official."

C. The Publication Was Defamatory

Under *Civil Code* § 46, a statement is defamatory if it "[c]harges any person with having been indicted, convicted, or punished for crime" or "[t]ends directly to injure him in respect to his office, profession, trade or business," among other things.

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In the present case, Barlow stated that "This lawsuit is an abuse of the judicial system by a former officer who was terminated a year ago for egregious misconduct which led the District Attorney to declare that he had obstructed justice and compromised a criminal narcotics investigation." (Humiston Decl., Exhibit "3.")

This statement appears to charge Plaintiff with "having been indicted, convicted or punished for a crime" of "obstruction of justice" and "compromising a criminal narcotics investigation" - neither of which is true, as is undisputed that Plaintiff was never charged with any crime, of any kind, ever. Further, this statement is certainly injurious to Plaintiff's hopes for a future career in law enforcement. Defendant has conceded the injurious nature of the allegations in the termination letter itself, so it cannot be disputed.

Therefore, Plaintiff respectfully maintains that the publication was defamatory such that Defendant's anti-SLAPP motion should properly be denied.

IV. THE REMEDY OF INJUNCTIVE RELIEF IS PROPER

Injunctive relief is a remedy which is derivative of the other causes of action. Because Plaintiff has stated a valid claim for an invasion of privacy and for defamation, Plaintiff respectfully maintains that this remedy should remain intact - however inartfully pleaded.

V. DEFENDANT'S CLAIM OF IMMUNITY MUST FAIL

A. Government Code §821.6 Does Not Apply

It is well settled that the immunity set forth in Section 821.6 "protect(s) public employees from liability only for malicious prosecution" actions. Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719-720. "Our narrow interpretation of section 821.6's immunity, **confining its reach to malicious prosecution actions**, finds corroboration in another governmental immunity provision, section 820.4 discussed above." *Id.*, at p.721. (See also Garcia v. City of Merced (2008) U.S. Dist LEXIS 2135, approving of the Sullivan ruling: "Section 821.6 immunity is generally perceived as prosecutorial immunity and immunity from malicious prosecution. Kayfetz v. State of California (1987) 156 Cal.App.3d 491; accord Citizens Capital Corp v. Spohn (1982) 133 Cal.App.3d 887.)

Because this case is not for malicious prosecution, *Government Code* § 821.6 is inapplicable and should properly be disregarded by this Court.

B. Defendant's Cases Are Distinguishable

The cases cited by Defendant are all distinguishable from the case at bar. Kim v. Walker (1989) 208 Cal. App. 3d 375, relied upon by Defendants, is inapplicable because "all of Kim's allegations of defamation . . . took place either during communications with parole agents or during judicial proceedings, or other official proceedings authorized by law." Kim, supra, at p. 381. In contrast, Plaintiff's personnel records were disseminated to the **press** in this case, not to the Court.

In Citizens Capital Corp. v. Spohn (1982) 133 Cal.App.3d 887 (also relied upon by Defendants), the court based its holding entirely on the Supreme Court's opinion in Kilgore v. Younger (1982) 30 Cal.3d 770. There is no mention of §821.6 in Kilgore, *supra*, nor is there any reference in either case to disclosure of confidential information to the press. Moreover, Citizens Capital Corp. is no longer good law, as it has been superseded by statute (Government Code § 821.6). (See Clarke v. Upton, 2008 U.S. Dist. LEXIS 38206.) Thus, Citizens Capital Corp, *supra*, should properly be disregarded by this Court.

Defendants also rely on Cappuccio, Inc. v. Harmon (1989) 208 Cal. App. 3d 1496, in which a state fish and game investigator was found to have immunity for making statements to the press. What Defendants left out of their moving papers, however, is that the plaintiffs "were found guilty by the Monterey County Superior Court of 592 violations of former Fish and Game Code section 8011," and that the statements to the press were made after the guilty verdict. *Id.*, at p. 1498. In enforcing Section 821.6 and finding immunity, the Court held that the statements made by the warden were in furtherance of the **prosecution** by Monterrey County, such that the Capuccio action was really one for malicious prosecution. *Id.*, at pp. 1500-1502.

Because there was no **prosecution** in this case, Cappuccio, Inc. v. Harmon is factually inapposite to the case at bar and should properly be disregarded by this Court.

C. Civil Code §47(b) Does Not Apply to Statements Made to the Press

Defendants argue that they are immune from liability for their actions under the litigation privilege found in California *Civil Code* §47(b). However, in Rothman v. Jackson (1996) 49 Cal.App.4th 1134, the court held that statements made by an attorney to the press are not protected by the litigation privilege in Civil Code §47(b). The court explained:

"The defendants have suggested no way in which the purposes of the litigation privilege are furthered by extending it to press conferences and press releases. Lawyers are not prevented from the most zealous advocacy for their clients by a wholesale rule which precludes the privileged vilification of opponents on the public stage--in this case, on a world stage. Such a rule does not stop lawyers from insisting in public that their clients are innocent of charges made by opponents. Indeed, under the policy choice that is implicit in the litigation privilege, no inhibitions are imposed upon the rhetoric an attorney may use in official court papers, pleadings and arguments. However, . . . attorneys who wish to litigate their cases in the press do so at their own risk--that is to say, protected by the First Amendment to the United States Constitution and all principles which protect speech and expression generally, but without the mantle of an absolute immunity." Rothman v. Jackson (1996) 49 Cal.App.4th 1134, 1148-1149.

Thus, Plaintiff respectfully maintains that Defendants' conduct is not protected by Civil Code §47(b).

D. Government Code Sections 818.8 and 822.2 are Inapplicable

Defendants also claim immunity under *Government Code* sections 818.8 and 822.2. However, these sections only provide immunity for certain types of fraud and deceit of a financial nature, not present in the case at bar. (See, e.g. Adkins v. State (1996) 50 Cal.App.4th 1802; Tur v. City of Los Angeles (1996) 51 Cal.App. 4th 897; Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal.App.3d 859.) For this reason alone, the disputed Sections are inapplicable to the case at bar.

Furthermore, Defendant admits that the *Government Code* sections 818.8 and 822.2 immunities are inapplicable if Defendants actions were committed with malice. (Motion to Strike, p.9, line 2) As more fully described above, Barlow either knew, or in the exercise of reasonable diligence should have known, that the Brady Letter predated Plaintiff's termination, and therefore could not have "led the District Attorney to declare that (Dunn) had obstructed justice and compromised an ... investigation." Barlow also knew, or in the exercise of reasonable diligence should have known, that the Brady Letter should "not be used as a basis for a personnel action," and he should not have implied that the DA personally investigated and reached **any** conclusion about Dunn's alleged conduct. Therefore, sufficient evidence exists of "actual malice" to survive the within anti-SLAPP motion - even if the Court concludes that Plaintiff is a "public official."

Therefore, Plaintiff respectfully maintains that the immunities as set forth in *Government Code* sections 818.8 and 822.2 are inapplicable to the case at bar.

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VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully maintains that sufficient evidence exists to support each and every cause of action set forth in the Complaint. Therefore, and for reasons fully set forth in detail above, Plaintiff respectfully maintains that Defendant's anti-SLAPP motion is entirely without merit and respectfully requests that the relief requested in the moving papers be denied.

Respectfully submitted.

Dated: September 25, 2009

LAW OFFICES OF RHEUBAN & GRESEN

By _____
JOSEPH LEVY
Attorneys for Plaintiff, Christopher Dunn